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# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 184

MAURICE M. FILISTER AND J. J. BLISS

*Appellants*

VS.

CITY OF MINNEAPOLIS AND WILLIAM H. BORGERT, FLORENCE H. BORGERT, HAROLD G. BROTHERS, SALLY BROTHERS, JACK A. ISAAMAN AND IVY ISAAMAN

*Appellees*

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

## RESPONSE TO MOTION TO DISMISS APPEAL

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## RESPONSE TO MOTION TO DISMISS APPEAL

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At page 2, the appellees correctly state:

> "* * * the use of the land was restricted by the applicable zoning ordinance to single-family detached dwellings and certain other non-commercial uses excluding apartment buildings."

However they neglected to inform the Court that by stipulation at the trial it was agreed that the data concerning costs and values would apply without specific proof to all uses permitted under the ordinance, including such things

as public buildings, churches and school houses (R. p. 203, ff. 1-2-3; R. p. 204, ff. 1-2-3).

On the same page, the appellees referred to the "residential character which the neighborhood had always possessed." By looking at Exhibit A, the Court will see that plaintiffs' eight acre tract involved in this lawsuit was bounded on the east on the other side of the street by neighboring landowners, on the north by railroad tracks, on the west by another municipality and on the south by several acres of vacant land belonging to the appellants.

Also on the same page is the reference to the fact that Bliss bought the property for $3,800 at a tax sale. Appellees neglected to point out that in the opinion of the Supreme Court of Minnesota this point was noted to be without merit. See Jurisdictional Statement, top of page 19.

Also at page 2 it was stated that the court found that the market value of the land after the improvements necessary to bring the land into condition for building would exceed the cost of such improvements. What the court said was quite different See Record p. 29, folio 1:

> "that the total cost to the plaintiffs of lots so piled and filled would be *somewhat* less than the value of building lots of comparable size in the area." (Emphasis supplied.)

That was a finding of fact. This finding of fact is not referred to in the motion to dismiss. The court then added the following statement:

> "that the development of the plaintiffs' property into lots reasonably comparable to other lots in this area by such piling and fill is reasonably economically feasible."

This statement is merely a conclusion from the finding of fact above quoted. This Court is in a position to judge whether that conclusion was justified.

"Somewhat" is defined as meaning "in some degree or measure; a little." *Atchison, T. & S. F. R. Co. v. Vanordstrand*, 73 P. 113, 115, 67 Kan. 386. See dictionary definition.

The statement at the bottom of page 2 that the Supreme Court of Minnesota held "that there was evidence to support the court's conclusions" is not quite accurate. What the Court said as shown in our Jurisdictional Statement at page 17, was:

> "Although we have some hesitation in relying on evidence of this kind, we believe the court's finding that the property has, or can economically be made to have, some substantial value is *not wholly* without support in the record." (Emphasis supplied.)

Then the Court went on to indicate what it considered support:

> "Mr. Bliss himself testified that before he completely understood the soil problems he thought $8,000 an acre was a reasonable value for purposes of sale. One of the plaintiffs' own experts stated that in his opinion the land had a value of $2,500 an acre, although he later indicated his estimate related only to school and church uses. There was hearsay testimony, admitted without objection, that plaintiffs' real estate agent had declined an offer of $40,000 for the property. This evidence, together with the price of $56,000 contained in Bliss' option to Filister, *lends support* to the court's conclusion that the real estate did have substantial value and the ordinance as applied to plaintiffs was not therefore unreasonable, confiscatory, arbitrary, or void." (Emphasis supplied.)

I have already commented to some extent upon this attempt by the Court to buttress the lower court's conclusion. See page 10 of our Jurisdictional Statement. I should like to add that the expert's statement that the value of $2,500 an acre was not allowed to stand by the lower court and was excluded by virtue of the stipulation between the parties. See Record p. 237, folios 1-2-3.

The hearsay statement that a real estate agent declined an offer of $40,000 for the property (R. p. 394, f. 1) was answered by Bliss (R. p. 153, 154). It is also to be noted that the option price of $56,000 was to be taken advantage of only in the event rezoning occurred (see option agreement on file).

It is also to be noted that the Supreme Court misstated the finding of the lower court when it decided that certain stated facts "lend support to the Court's conclusion that the real estate did have substantial value." This is in our Jurisdictional Statement at page 17.

Under the heading "The Appeal Does Not Present A Substantial Federal Question", Motion page 3, it is asserted that the Supreme Court of Minnesota balanced the claimed right of one landowner against the vested rights of surrounding landowners. Its claim that the surrounding landowners had vested rights is not backed by authority. The landowners are referred to as "surrounding landowners." Of course, as is indicated above, they are not *surrounding* landowners. Nor is there any evidence whatsoever that the landowners in question would be injured. The undisputed evidence is to the contrary. See Record pages 243, 245.

On the fundamental issue of the extent to which the value of plaintiffs' property was destroyed, it is asserted at page 4 as follows:

> "Yet the record clearly shows that the trial court and the Supreme Court were right with respect to costs of improvement (R. p. 326, f. 3; R. p. 327, f. 1) and as to the probable market value of the land after being brought to normal condition (R. p. 250, f. 3; Defendant Intervenors' Exhibit 3; R. p. 307, f. 1; R. p. 375, f. 1. See also the opinion of the Supreme Court Jurisdictional Statement, Appendix A, p. 17). Only an issue of quantum of proof is presented here and this does not involve any federal question."

With respect to the testimony at page 326 of the record, appellees spelled out in cross examination what they claim is the average cost of making the lot suitable, i.e., averaging the upper 1/4 of the property with the remaining 3/4. (The average should have been between the upper 15% and the remaining 85% which would have brought the average up.) Moreover the item of $300 for additional waterproofing on the houses on smaller sized lots to which this cost was applied is not taken into account. Costs of waterproofing on larger houses would be proportionately more.

The record at page 250 deals with the average value of the lots after they were made suitable for the use under the present zoning, as given by our expert who is uncontradicted. Appellees do not attempt to carry the calculation forward to any conclusion.

Record page 440, Exhibit 3 is merely a typewritten statement of Mr. Garzon as to *sale prices* of lots in the adjoining block.

The statement above quoted from appellees' motion to dismiss refers to both phases of the problem. One has to do with costs, and the other has to do with market value. With respect to the matter of costs, the following must be taken into consideration:

Mr. Vasatka, defendants' expert, gave the cost of putting the property in suitable condition at $3,060 on the average, not $3,000 (R. p. 326, f. 3 and R. p. 327, f. 1).

Mr. Gullickson did give the figure of $2,700 as the average value of lots 60 x 130 feet (R. p. 377, f. 1). The average of $2,700 was clarified through cross examination by Mr. Shama in Record page 378, f. 1 where he said:

> "My valuation is based on $40.00 a front foot up near the railroad; $50.00 a front foot for the good lots down to the south end. * * *"

It follows from his testimony that the lots which were not near the railroad and which had a front of 60 feet were, according to him, worth $3,000 and lots of the same size near the railroad were worth $2,400. As against the $3,000 value of the good lots not near the railroad, we used Mr. Vasatka's cost of making the land suitable of $4,511, which is $1,511 more than the value of the lots. It is clearly apparent that this attempt at averaging is wholly unrealistic.

With respect to the testimony of Mr. Garzon (R. p. 440), the reference is to Defendant-Intervenor's Exhibit 3 which is a typewritten statement by Mr. Garzon, the City Assessor, as to the sale prices of a few lots in the block adjoining plaintiffs' property. The fact is that Mr. Garzon gave no opinion whatsoever as to the value of the plaintiffs' property. His testimony was objected to as being clearly inadmissible. (R. p. 440, f. 2.) The court received it subject to our objection (R. p. 440, f. 2).

See the case of *State, by Lord v. Winiecki*, 263 Minn. 91, as follows:

> "It is well settled that in condemnation proceedings

> the consideration paid for other property even when adjacent to the tract involved, and evidence with reference to sales prices involved in recent sales in the vicinity is inadmissible as substantive proof of the reasonable market value of the lands involved in the condemnation proceedings. *Stinson v. Chicago, St. P. & M. Ry. Co.* 27 Minn. 284, 6 N. W. 784; *Board of Education v. Heywood Mfg. Co.* 154 Minn. 486, 192 N. W. 102; *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 277 N. W. 394, 124 A. L. R. 897. The basis for the rule is readily understood. It is very seldom that two properties are alike in every respect, so that the price paid for one would be a clearcut indication as to the reasonable market value of the other. The surrounding circumstances, the reasons for the sale or purchase, and many other factors may affect the sales price of the one but in no way affect the value of the other. It is clear that here unless the challenged evidence became admissible because of questions asked by opposing counsel on cross examination, neither the written appraisal report nor the oral testimony with respect thereto was admissible."

With respect to Mr. Garzon's testimony, we asked the trial court to indicate whether or not it had relied upon it (R. p. 36) and the court responded (R. p. 45, f. 3):

> "As to the rulings of the Court on the evidence taken subject to the objection they are included in the Court's ultimate decisions and conclusions of law."

It is evident that the Supreme Court of Minnesota did not rely upon Mr. Garzon's testimony as to value because it could not have done so without violating its own decision on the point and secondly, because if it had done so it would clearly have made some statement about it which it did not do.

Under the heading, "The Judgment Appealed From Rests On An Adequate Non-Federal Basis," the appellees referred at page 5 to the pleadings. We submit that the pleadings have no relation to laches or estoppel because they do not plead reliance on the plaintiff's inaction or detriment to anybody. See *French v. Lindh-Gustafson-Klopper Company, Inc.*, 216 Minn. 52 and *Macomber v. Kinney*, 114 Minn. 146, 128 N. W. 1001; *Minn. Rules of Practice*, Sec. 8.03. It can hardly be assumed that the Minnesota Supreme Court intended to overrule these cases when it does not say anything about it. What the Court did was to say that they were relying upon the Kentucky case, *Hodge v. Luckett*, (Ky.) 357 S. W. 2d 303, 305, which we shall discuss now.

The Kentucky Court indicated in the opening statement that this is a "spot zoning" controversy. The lower court was reversed on the question of fact as to whether or not the property was suitable for residential purposes. The Supreme Court of Kentucky found as a fact that:

> "Only the westernmost portion of the property, variously estimated from 20% to 50%, could possibly be developed for residential use under existing circumstances."

The Court also found that:

> "Actually its suitability for residential purposes is a relative proposition. Foeman himself lives on it. It is suitable for pasture and truck gardening, having been so used all along."

The Court also found that:

> "An industrial concern might be willing to pay a high price for the whole 18½ acres in this case in order

> to utilize only that portion which is fit for residential construction, leaving the marshy bottom even less used than it is at present. The practical result of rezoning would thus be limited to that portion of the property which in fact is not distinguishable in condition or character from the surrounding residential area and which there is absolutely no basis to rezone."

The Fourteenth Amendment is not mentioned. Nor was it claimed that the land would be wholly valueless or that substantially all the value would be taken. The Supreme Court on the basis of the facts found to the contrary.

Our Supreme Court, quoted that portion of this opinion where the Court said at page 305:

> "True, his property ought not to be forever consigned to oblivion * * *."

The idea that it was being consigned to oblivion is just not true. The Court held that 20% to 50% of the property could be developed for residential use under existing circumstances and that it was all being used for some practical purpose in any event and that the proposed use was only for that portion that could be used for residential purposes.

This language could not have been intended to apply to the facts in the case under consideration by the Kentucky Court as is clearly evident from its context. How can it be said that property would be consigned forever to oblivion in the face of the findings in the opinion above quoted? The Kentucky case is a simple case in which the parties sought to have property rezoned on the ground that the property was not suitable for residential purposes and the Court found as a matter of fact to the contrary. All of the language in that case about laches or estoppel are plainly not necessary to the decision.